In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No.

SALVATORE MAUGERI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION AND JUDGMENT OF THE COURT BELOW.

The opinion of the respondent Court was rendered and filed on October 20, 1945. (R. 197.) It is not reported.

The judgment of the Court below was filed and entered on October 20, 1945. (R. 197-8.)

A petition for rehearing was denied by the Court below on November 24, 1945. (R. 198.)

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code. (28 U.S.C.A., sec. 347.)

The grounds on which the jurisdiction of this Court is invoked are fully set forth in the petition filed herewith under the heading "Jurisdictional Statements", and are as follows:

1. The action of respondent Court in affirming the judgments of conviction and the consecutive sentences imposed on the verdicts of guilty, the evidence only disclosing the commission of one offense, constituted a violation of the Fifth Amendment by subjecting petitioner to double punishment for one offense. Where the action of respondent Court results in denying to a petitioner a constitutional right this Court can correct such error on certiorari. (See cases of *Powell v. Alabama,* 287 U. S. 45, 77 L. ed. 158; *Brown v. Mississippi,* 297 U. S. 278, 80 L. ed. 682.)

2. Respondent Court, by affirming the imposition of consecutive sentences for one offense, has misconstrued and misapplied the provisions of the Fifth Amendment to the Constitution—prohibiting double jeopardy and the deprivation of liberty without due process of law. Under such circumstances it is proper for this Court to correct such error on a writ of certiorari. (See, *United States v. Rizzo,* 297 U. S. 530, 532, 80 L. ed. 844, 847.) The action of respondent Court, in effect, holding that the conviction of a person is lawful where the only proof consists of an

extra-judicial statement of the accused, is in direct conflict with comparable decisions rendered by Circuit Courts of Appeals in other circuits. Under such circumstances this Court can reconsider such conflict on certiorari. (*Dept. of Treasury v. Ingram-Richardson Mfg. Co.*, 313 U. S. 252-253, 85 L. ed. 1313, 1315.)

3. The proceeding involves a construction of the double jeopardy clause of the Fifth Amendment defining whether double punishment for the same offense falls within such constitutional prohibition. Such question is of material importance and requires a decision of this Court. (*Fed. Trade Com. v. Raladam Co.*, 316 U. S. 149, 150, 86 L. ed. 1336, 1339.)

STATEMENT OF THE CASE.

The indictment against petitioner charged him with two violations of the *Jones-Miller Act*, 21 U.S.C.A. 347. Count one charged him with having on August 12, 1944, at the City of Santa Cruz, concealed and facilitated the concealment of 105 tins of smoking opium. (R. 2.) Count two of the indictment charged petitioner with having on August 13, 1944, facilitated the transportation of the same lot of opium. (R. 2.) The evidence as to the events of August 12th and 13th were only testified to by one witness for the Government, Benedict Pocoroba.*

---

*We set forth in full the testimony of Pocoroba as to the occurrences on August 12 and 13 in the petition and will again state the same in more detail in our argument herein.

In substance, Pocoroba testified that in a cabin he had rented at Santa Cruz and which was being used by Tocco and Barri (charged as co-defendants with petitioner) about eleven o'clock on the evening of August 12 Maugeri came into the cabin carrying a pasteboard box, left the cabin and returned with another pasteboard box; that Tocco received these boxes; that Maugeri then left without conversing with Tocco or Barri and on leaving stated, "I will pick you up at 5:00" (R. 35); that thereafter Tocco and Barri opened the pasteboard boxes which contained tins of opium and packed them in suitcases (R. 37); that about 3:30 in the morning of August 13 somebody rapped at the door, Tocco opened the door and Maugeri said, "Let's get the grips and let's go." (R. 38.) There is no other evidence in the record as to the subsequent activities of Maugeri save the testimony of Pocoroba that on August 16 he had a conversation with Maugeri in which he asked him where he had driven Tocco and Maugeri said to Berkeley. (R. 42.)

The foregoing constitutes all of the evidence relative to the charges contained in both counts of the indictment.

SPECIFICATIONS OF ERRORS RELIED ON.

1. Respondent Court erred in affirming the convictions on both counts of the indictment and in affirming the imposition of consecutive sentences on these two counts. Such action constitutes a violation

of the double jeopardy clause of the Fifth Amendment in that the evidence disclosed the commission of but one offense.

2. Respondent Court misconstrued and misapplied the double jeopardy and due process of law clause of the Fifth Amendment in confirming the convictions and sentences of petitioner in that, by so doing, it in effect construed said clauses of the Fifth Amendment as justifying two convictions and the imposition of two consecutive sentences for the commission of one offense.

3. Respondent Court erred in holding that a defendant can be convicted of a crime without any evidence to establish such crime save the extra-judicial statement of such defendant.

ARGUMENT.

1. THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION WAS VIOLATED BY THE VERDICTS FINDING APPELLANT GUILTY ON COUNTS 1 AND 2 OF THE INDICTMENT AND BY THE COURT ORDERING THE SENTENCES PRONOUNCED ON EACH OF SAID COUNTS TO RUN CONSECUTIVELY.

Count one of the indictment (R. 2) charges that the defendant

> "* * * on or about the 12th day of August, 1944, at the City of Santa Cruz, State of California, * * * fraudulently and knowingly did conceal and facilitate the concealment of a lot of smoking opium in quantity particularly described as 105 tins containing approximately 700 ounces of smoking opium," etc.

Count two of the indictment (R. 2) charges:

> "That on or about the 13th day of August, 1944, at the City of Santa Cruz, State of California, * * * said defendants fraudulently and knowingly did facilitate the transportation of a lot of smoking opium, in quantity particularly described as 105 tins containing approximately 700 ounces of smoking opium," etc.

A mere reading of the two counts discloses that they refer to the same place, the same time and the same opium. They are based on the same statute.

The evidence discloses that the same identical tins of opium—and no others—are involved in both counts, that the same time and place is also involved and that the events of the night of August 12th and early morning of August 13th constitute one continuous, unbroken occurrence. In other words, the events occurring at the times alleged in the indictment and disclosed by the evidence constitute but one indivisible offense.

Stripped of surrounding circumstances the events in question will be found in the testimony of the witness Pocoroba.

Pocoroba's testimony will be found in the transcript of record from page 34 to page 38 as follows:

> "On the following morning, Saturday, August 12th, Maugeri told Barri, 'The man is here again and I have already given him the money. Now, it is entirely up to you. You take the stuff or they will dump it in the ditch.' At that time Barri said, 'I don't know how you people do busi-

ness in California.' He said, 'Where do you expect me to pack this stuff, in the street? Your friend in San Francisco won't give me permission to pack it in his house; you won't give me permission to pack it in your house. What am I to do?' Maugeri then got up and said, 'I am going to work. Think it over and let me know.' Maugeri then left the cabin shortly after 9:00 o'clock on that morning. About 5:00 o'clock in the afternoon of that same day Joe Tocco was in my cabin, and he asked me for permission to pack the opium in my place. I agreed. Tocco then left the cabin, and returned in about ten or fifteen minutes. Barri was in the cabin with me at the time Tocco returned. The cabin consists of a combination living and bedroom, a kitchen and a bathroom. * * * After 11:00 o'clock on Saturday evening August 12th, Joe Tocco and Joe Barri and myself being present, Maugeri came into the cabin carrying a pasteboard box covered by newspaper. He gave it to Tocco, who put it on the floor. Maugeri then went away and came back a few minutes later with another box about the same size, also wrapped in newspaper and Tocco received it. I then mixed a drink and gave it to Sam Maugeri. He drank it in a hurry and went away. Maugeri had no conversation with Tocco or Barri at this time and place. When Maugeri left he said to Tocco 'I will pick you up at 5:00 o'clock.' * * * Tocco produced a small mail scale. They cleared the bureau of all the articles there were on it, and they placed the scales on the bureau, and Joe Barri started to weigh each individual can of opium, and Joe Tocco would mark down the weight. * * * They weighed each can separately and they marked the weight on a piece

of paper, and then they started to wrap it in brown wrapping paper into bundles and tied the bundles with gummed paper tape and then put the bundles in the brown leather bag and the blue overnight bag. The big bag was then placed under the bed and the small bag on a chair. They finished weighing the cans around 1:00 o'clock, which would then be Sunday morning, August 13th. I went to bed at that time. * * * I retired in the single bed at about 1:00 o'clock and Barri and Tocco did not retire until 2:00 o'clock. They occupied the double bed in my cabin. At about 3:30 somebody rapped at the door and Joe Tocco went to the door and opened it, and Sam Maugeri said, 'Let's get the grips and let's go.' Tocco was dressed; he hadn't undressed for the night, but he had taken his shoes off. Tocco then took the brown leather suitcase, Government's Exhibit 1 for Identification, and the blue overnight bag, Government's Exhibit 2 for Identification, and left the cabin. Barri and I remained in the cabin."

The evidence fails to disclose that Maugeri ever had possession of the pasteboard boxes at any time prior to 11 o'clock on the night of August 12th. The Government's evidence is silent as to any acts of Maugeri after 3:30 in the morning of August 13th. Thus, the testimony as to Maugeri's activities is limited to a continuous period of but four and one-half hours.

Maugeri testified that on Saturday night, August 12th, he went to Pocoroba's cabin where he saw Pocoroba, Tocco and Barri and had a drink with them;

that he stayed there about six or ten minutes then went back to his concession (R. 171) where he remained until around a quarter to two (R. 172) after which he went home and to bed and did not get up until 7 or 7:30 on the morning of Sunday, August 13th. (R. 172.) There is no evidence in the record contradicting the testimony of Maugeri as to his activities after 11 P. M. on August 12th, except the testimony of Pocoroba that the voice that spoke from outside the door of his cabin at 3:30 on the morning of the 13th was that of Sam Maugeri (R. 38); that he did not see the person who spoke (R. 38, 79); that it might have been Maugeri's voice (R. 79); that it sounded like Maugeri's voice. (R. 77.)

Assuming that the boxes contained opium, we come to the unalterable conclusion that the acts of Maugeri were but necessary incidentals to the ultimate transaction. Maugeri was accused and convicted of (a) concealing and facilitating the concealment of the opium and (b) facilitating the transportation of the same opium. Before the opium could be concealed it had to be possessed. Before the opium could be transported it had to be possessed. The concealment of the opium, whether by wrapping the tins in wrapping paper or putting them in the suit cases, was an incidental part of the transportation.

As the entire transaction, according to the Government's contention and evidence, consisted of the transportation of the opium from Santa Cruz to some other place, the acquiring possession of the opium and the

wrapping and packing of the opium were necessary and incidental to the ultimate act of transportation.

The cases are many and uniform that, under the facts disclosed, the offense committed, if any, was but one and could only be punished once.

The question of double jeopardy is not confined to a mere reading of the indictment or judgment. It is sufficient if such fact appear anywhere in the record.

> "It is true that in the case of Snow we laid emphasis on the fact that the double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment or anywhere else in the record (of which the judgment is only a part), it is sufficient."
>
> *Ex Parte Nielsen,* 131 U. S. 176, 183, 33 L. ed. 118, 120.

The cases establishing that the facts herein prove but one offense for which only one punishment can be imposed follow:

> "It is, however, assigned for error that the court erred in imposing sentence on both counts of the information. In this we concur, and think that what the court did amounted to imposing a double sentence for a single offense. The same facts proved unlawful possession and unlawful transportation. The only act of possession testified to was the possession necessarily involved in the transportation which was the subject of the second count. The officer testified that he saw the defendant leave the hallway of a five-story tenement house with a package which contained six bottles of gin, which he deposited in his auto-

mobile. There is no evidence that the accused lived on the premises, and his own testimony was that his home was in Brooklyn, on Decatur street. The possession was necessary and incidental to the act of transportation. There may be, and commonly is, possession which is distinct from transportation.

"Possession for a substantial time, and followed by transportation, might constitute two distinct offenses, just as possession for a substantial time, followed by a sale, might amount to two distinct offenses. But, where the only possession shown is that which is necessarily incidental to the transportation, the offense is single, and not double. (Citing cases.) And the law is settled that, where a person is tried and convicted of a crime which has various incidents included in it, he cannot thereafter be tried and punished for an offense consisting of one or more of such incidents. To do so would be to inflict double punishment."

Schroeder v. United States (C.C.A. 2), 7 Fed. (2d) 60, 65.

In *Copperthwaite v. United States* (C.C.A. 6), 37 Fed. (2d) 846, defendant was charged in two counts: first, with the purchase and sale of unstamped morphine and secondly, with buying and selling the same amounts of morphine. The first count charged a violation of the Harrison Anti-Narcotic Act and the second count a violation of the Narcotic Import Statute. The appeals court held that defendant could not be punished under both acts, and, at page 847, states:

"When a single act is in violation of two laws, it may be penalized in each; but this conclusion

leads to an inquiry as to double punishment. *The same act may not be twice punished by the same sovereignty, merely because it violates two laws.* Identity, as to double punishment as well as to double jeopardy, is shown if the same evidence necessary to prove either offense will also necessarily establish the other and this relation is reciprocal (and perhaps even if not reciprocal); in other words, can either be shown without disclosing the other? Reynolds v. U. S. (C. C. A. 6) 280 F. 1, 2; Miller v. U. S. (C. C. A.) 300 F. 529, 534. When thus tested there was here double punishment. The entire proof in this case consisted of evidence that the defendants agreed to furnish and sell morphine to a purchaser and thereafter did have it (unstamped) in their possession and deliver it to him. By virtue of the presumption declared in the Harrison Act, this possession tended to show the forbidden purchase; and the same possession also tended—by virtue of the presumption declared in the Import Act—to show unlawful importation and defendant's knowledge. In such case the government may punish for either offense, but we think the supporting evidence does not so materially vary as to justify two punishments, merely because two inferences are attached by different statutes to the same evidential basis." (Italics ours.)

In *Morgan v. United States* (C.C.A. 4), 294 Fed. 82, defendant was charged with unlawfully manufacturing whisky, the unlawful possession of whisky and the unlawful possession of property designed for the manufacture of whisky. The Court held only one offense and not three had been committed, stating, at page 84, as follows:

"Conviction of the defendant on the charge of manufacturing moonshine whisky, under the facts of this case, necessarily embraced conviction of the offense of having in possession the same moonshine whisky, and the offense of having in possession property designed for the manufacture of moonshine whisky, charged in counts 1 and 2 of the same indictment. The act charged in count 3 includes acts charged as crimes in counts 1 and 2. It follows that the sentence under counts 1 and 2 must be set aside, as was properly conceded by the United States Attorney."

The Appeals Court for the Sixth Circuit rendered the following opinion:

"It is next urged that sentences for the sale and for the possession constitute a double punishment for the same act. We think this contention is sound. The act of possession relied upon was merely the possession necessarily incidental to the sale which was the basis of the sale count. We considered this subject in Reynolds v. U. S., 280 Fed. 1. While there may be, and commonly is, possession without sale, so that possession for a substantial time, followed by a sale, might be two distinct offenses, in this case the only possession shown was that which temporarily came to Miller for the purpose of completing by delivery the sale which he was making. The same testimony which showed the sale necessarily showed the only possession which is shown at all."

Miller v. United States (C.C.A. 6), 300 Fed. 529, 534.

Respondent Court has heretofore followed the foregoing rules in *Parmagini v. United States* (C.C.A. 9), 42 F. (2d) 721:

> "With reference to Counts I and III, one for selling morphine and the other for distributing opium, the transaction was an entity, the delivery of the opium was a mere incident to the delivery of the morphine, and the transaction comes clearly within the rule stated by the Circuit Court of Appeals for the Eighth Circuit in the last mentioned case." (Referring to the case of *Bradin v. United States,* 270 Fed. 441, 443.)

The Supreme Court of California has applied the rules and reasonings of the foregoing cases and has ably summed up the manner of their application in a case where the defendant was charged in two counts with having a still in his possession and control and in unlawfully operating such still. We quote from a portion of the California Court's opinion:

> "As early as *People v. Shotwell,* 27 Cal. 394, and *People v. Frank,* 28 Cal. 507, it was held that co-operative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted as one offense. 'Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table and inducing others to bet upon it, may also constitute a distinct offense; for either,

unconnected with the other, an indictment will lie. Yet when both are perpetrated by the same person, at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted.' (Wharton on Criminal Law, approved in People v. Shotwell, 27 Cal. 394.)"

People v. Clemett, 208 Cal. 142, 144.

The California Court then states the reasons why a statute, such as the one involved herein, containing several elements in the disjunctive *should not be construed as inflicting a separate penalty for the doing of each element thereof:*

"All of the acts set out in the statute before us for construction are coupled with the disjunctive 'or', one of which or all of which joined constitute but one offense. * * *

"The severity of the penalty for the violation of the provisions of the act, the maximum being five years' confinement in the state prison, and a fine of $5,000, is in confirmation of our construction. It was not the intent of the legislature that the several acts named in the statute before us should be split into several separate offenses for the purpose of imposing a penalty for the violation of each singly."

People v. Clemett, 208 Cal. 142, 145-147.

In the case at bar we have but one statute in which all the acts set out therein are coupled with the disjunctive "or". Clearly Congress never intended that a person should suffer imprisonment for 70 years and be fined in the sum of $35,000 because he had unlaw-

fully imported, received, concealed, bought, sold, facilitated the concealment and facilitated the transportation of the same lot of narcotics in one continuous operation.

In *United States v. Adams,* 281 U. S. 202, 74 L. ed. 807, Adams, a bank officer, had previously been tried and acquitted for making a false entry in a book of the bank which imported a remittance of $75,000 to another bank to the credit of defendant. Subsequently Adams was again indicted for making a false entry in another book of the bank importing that he had made a deposit of $75,000 to his credit. Adams pleaded a former acquittal. The Supreme Court upheld the plea of former acquittal and in doing so stated:

> "* * * The two entries had reference to the same transaction, were based upon the same draft and were *the correlated means of accomplishing a single fraud,* if fraud there had been. The district court held that on its construction of Rev. Stat. §5209 * * * there could be but one prosecution for false entries based upon any single draft, even though several different entries were made in the different books of the bank, all relating to the same. Therefore it sustained the plea. The United States appealed.
>
> "It is a short point. The statute punishes any officer of a Federal reserve bank who makes any false entry in any book of the bank with intent, etc. The government contends for the most literal reading of the words, and that every such entry is a separate offense to be separately punished. But we think that it cannot have been contemplated that the mere multiplication of entries, all to the same point and with a single intent, should

> multiply the punishment in proportion to the complexity of the bookkeeping. The judgment in the case is affirmed." (Italics ours.)

Here it was not contemplated that the punishment should be multiplied for the doing of a series of acts, all to the same point and with the same intent, merely because it required more than one act to accomplish the ultimate design.

Maugeri was not charged either with the possession of narcotics or with the transportation of narcotics; he was charged with concealing, facilitating the concealment, and facilitating the transportation of narcotics. If Maugeri's act of bringing the two boxes into Pocoroba's cabin at 11 o'clock was for the purpose of Tocco and Barri wrapping and placing the opium in the suitcases in order that it could be transported to some other place, then Maugeri's act was but one act and consisted in facilitating the concealment *and* transportation of the opium, an act that was a necessary incidental to the ultimate act of transportation.

Under the facts the sentence imposed on Maugeri—10 years' imprisonment and $5000 fine on Count I and 10 years' imprisonment and $5000 fine on Count II, said *sentences to run consecutively* (R. 17-18)—constitute double punishment and double jeopardy.

The Circuit Court of Appeals, by affirming the judgments of conviction and the consecutive sentences, has denied unto petitioner the protection of the Fifth Amendment and its decision is in direct conflict with the rights therein announced.

2. THE OPINION OF THE CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH OPINIONS RENDERED BY OTHER CIRCUIT COURTS OF APPEALS IN HOLDING THAT AN EXTRA-JUDICIAL STATEMENT IN AND OF ITSELF IS SUFFICIENT TO SUPPORT A CONVICTION.

In upholding the conviction and sentence imposed on count two of the indictment respondent court in effect has held that the extra-judicial statement of a defendant is sufficient proof of an offense charged. We have heretofore set forth the testimony relating to the occurrences on the night of August 12 and the early morning of August 13. There is no other evidence in the record establishing any activity on the part of petitioner from and after the hour of 3:30 a.m. of August 13, save and except an extra-judicial statement of Maugeri as testified to by the witness Pocoroba. Pocoroba testified that on August 16 he had a conversation with Maugeri in which he asked him where he had driven Tocco and that Maugeri replied that he had driven Tocco to Berkeley. (R. 42.)

The law and decisions are clear to the effect that the evidence did not establish the commission of the offense set forth in count two of the indictment.

Count II of the indictment charges the defendant with a violation of the *Jones-Miller Act*, the count reading in part as follows:

> "That on or about the 13th day of August, 1944, at the City of Santa Cruz, State of California, * * * said defendants fraudulently and knowingly did *facilitate the transportation* of a lot of smoking opium * * *." (T. R. 2.)

The *Jones-Miller Act* reads in part as follows:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall be fined not more than $5,000 and imprisoned for not more than ten years. * * *"
>
> 21 U.S.C.A. 174.

We emphasize to this Court the fact that Maugeri *was not charged* with either the possession or transportation of opium; he was charged with *facilitating* the transportation of the opium. Respondent Court has held that possession is not an element of the offense prescribed in the Jones-Miller Act (see *Pon Wing v. United States* [CCA-9], 111 F. (2d) 751, 758) and by a parity of reasoning and the absence of such wording in the Act, transportation is not an element of the offense. Possession and transportation constitute a violation of the Harrison Narcotic Act, but not of the Jones-Miller Act.

Respondent Court has also defined the meaning of the word "facilitate" as used in the Jones-Miller Act:

> "Anything done to make the continuance of the trip 'less difficult' would constitute facilitation of its transportation. Since the term 'facilitate' seems not to have any special legal meaning, the

framers of this statute must have had in mind the common and ordinary definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task'."

Pon Wing v. United States (CCA-9), 111 F. (2d) 751, 756.

So, the phrase "transport opium" necessarily means something different from "facilitate the transportation of opium". One can facilitate such transportation without actually transporting the article. One can transport an article without doing anything to facilitate such transportation.

There is nothing in the record to show that Maugeri did any act that "facilitated" the transportation of the opium or that rendered the movement of the opium "less difficult", or that operated to "make easy", or which acted to "free from difficulty or impediment" its transportation.

We have set forth above the facts relating to the night and morning of August 12th and 13th and discussed the sequence of events as disclosed by the record. All of these matters show but one continuous transaction in which each act of Maugeri was merely to bring about a concealment of the opium (if the Government's witness is believed and its theory adhered to). None of these acts "facilitated" in any manner the subsequent transportation of the opium.

In fact, if Maugeri had been charged with transportation—either as one directly performing that act or as aiding and abetting therein—the evidence would not have established guilt on his part.

The foregoing demonstrates the insufficiency of the evidence to support the charge. The only additional evidence is the claimed extra-judicial statements of Maugeri.

There is nothing in the record to show that the conversation between Pocoroba and Maugeri on August 16th referred to the morning of August 13th. So far as the record is concerned Maugeri may have been referring to a date much earlier than August 12th or 13th when he said he drove Tocco to Berkeley. The record does show that he drove to San Francisco—probably elsewhere—on several occasions prior to August 12th.

Whether Maugeri did or did not make such statement to Pocoroba is immaterial for the reason that *extrajudicial statements, admissions or even confessions of a defendant are incompetent to prove the corpus delicti of the offense with which he is charged.*

The *corpus delicti* of the offense charged in the second count of the indictment is not th *transporting* of opium, but is the *facilitating* of the transportation of opium. There is no evidence in the record, other than the claimed admission made by Maugeri, that even tends to establish that anything was done to *facilitate* any transportation.

It is fundamental that the *corpus delicti* must be established by evidence other than the extrajudicial statements, admissions or confessions of a defendant.

Ryan v. United States, 99 Fed. (2d) 864;
Goff v. United States, 257 Fed. 294.

It is equally well settled that an extrajudicial statement or confession cannot be considered in determining the sufficiency of the evidence to support a conviction *unless the corpus delicti is established by evidence independent of the extrajudicial admission or confession.*

Wynkoop v. United States, 22 Fed. (2d) 799;
Mangum v. United States, 289 Fed. 213;
Daeche v. United States, 250 Fed. 566;
Flower v. United States, 116 Fed. 241.

Eliminating the admission of Maugeri, as testified to by Pocoroba, there is absolutely no evidence in the record to show that anyone, let alone Maugeri, *facilitated* the transportation of the opium in question.

Under the foregoing facts the decision of respondent Court is in direct conflict with the foregoing decisions rendered in other circuits. In upholding the judgment as to count two the Court in effect held that the extra-judicial statement of Maugeri was sufficient to support the charge.

CONCLUSION.

We believe that the foregoing demonstrates that the opinion of the Circuit Court of Appeals is erroneous; that by such opinion and the judgment entered thereon petitioner has been denied the rights guaranteed to him by the Fifth Amendment and has been convicted and sentenced in direct violation of the mandatory language therein contained. We further believe that the entire record discloses that respondent Court has sanctioned a procedure in the trial of criminal cases not in accordance with the established rules of procedure as guaranteed by our Constitution, the laws and decisions of our Courts.

Dated, San Francisco, California,
December 12, 1945.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioner.

SOL A. ABRAMS,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

*this*_____*day of December, 1945.*

_____

Solicitor General of the United States,

_____

Deputy Solicitor General of the United States,

Attorneys for Respondent.